

Louisiana

By Harold J. Adkins

Uninsured Coverages

Is UM coverage mandatory or discretionary?

UM and UIM coverage is mandatory with limits equal to the bodily injury liability limits, unless the insured has validly rejected or selected lower limits on a form prescribed by the commissioner of insurance. An insured may change the original UM/UIM selection or rejection at any time during the life of the policy by submitting a new UM/UIM selection or rejection to the insurer on the form prescribed by the commissioner of insurance. *See* La. Rev. Stat. §22:1295(1)(a)(ii); *Duncan v. U.S.A.A. Ins. Co.*, 2006-363 (La. 11/29/06); 950 So. 2d 544.

Is UM coverage governed by a statutory scheme? Are there any landmark cases?

Yes. La. Rev. Stat. §22:1295; *Duncan v. U.S.A.A. Ins. Co.*, 2006-363 (La. 11/29/06); 950 So. 2d 544.

Must the insured reject UM coverage in writing? What happens if the insured has not rejected coverage in writing, but later seeks such coverage?

Yes. If the insured has not validly rejected or selected lower limits of UM/UIM in writing on the form prescribed by the commissioner of insurance, the policy will be reformed to provide UM/UIM in limits equal to the bodily injury liability limits of the policy. *See* La. Rev. Stat. §22:1295; *Duncan v. U.S.A.A. Ins. Co.*, 2006-363 (La. 11/29/06); 950 So. 2d 544.

Is UIM coverage mandatory or discretionary?

Mandatory. *See* answer to “***Is UM coverage mandatory or discretionary?***,” *supra*.

Is UIM coverage governed by a statutory scheme? Are there any landmark cases?

See answer to “***Is UM coverage mandatory or discretionary?***,” *supra*.

Must the insured reject UIM coverage in writing? What happens if the insured has not rejected coverage in writing, but later seeks such coverage?

See answer to “***Is UM coverage mandatory or discretionary?***,” *supra*.

Is uninsured motorist property damage (“UMPD”) coverage mandatory or discretionary?

Discretionary.

Unless the named insured has rejected uninsured motorist coverage, the insurer issuing an automobile liability policy that does not afford collision coverage for a vehicle insured thereunder shall, at the written request of a named insured, provide coverage in the amount of the actual cash value of such motor vehicle described in the policy or the minimum amount of property damage liability insurance required by the Motor Vehicle Safety Responsibility Law, R.S. 32:851 *et seq.*, whichever is less ...

La. Rev. Stat. §22:1295(1)(d). If the policy includes collision insurance, UMPD is not available. *See id.*

Is UMPD coverage governed by a statutory scheme? Are there any landmark cases?

Yes. La. Rev. Stat. §22:1295(1)(d).

Must the insured reject UMPD coverage in writing? What happens if the insured has not rejected coverage in writing, but later seeks such coverage?

Not applicable.

Is uninsured motorists “economic only” (“UEO”) coverage mandatory or discretionary?

Discretionary. Insurers have the option of offering uninsured or underinsured motorists “economic only” UEO insurance as an alternative to full UM/UIM coverage. UEO coverage excludes all noneconomic loss. Noneconomic loss means any loss other than economic loss and includes, but is not limited to, pain, suffering, inconvenience, mental anguish, and other noneconomic damages otherwise recoverable under the laws of the state. *See* La. Rev. Stat. §22:1295(1)(a)(i).

Is UEO coverage governed by a statutory scheme? Are there any landmark cases?

Yes. La. Rev. Stat. §22:1295(1)(a). *Dunn v. Terry*, 36,034 (La. App. 2 Cir. 06/19/02); 821 So. 2d 714, provides a discussion of how liability limits will be allocated between economic and noneconomic damages when UEO coverage is triggered by inadequate underlying liability coverage.

Must the insured reject UEO coverage in writing? What happens if the insured has not rejected coverage in writing, but later seeks such coverage?

Yes, if UEO coverage is offered by the insurer. If the insured has not validly rejected UM/UIM, selected lower limits of UM/UIM, or selected UEO coverage in writing on the form prescribed by the commissioner of insurance, the policy will be reformed to provide UM/UIM in limits equal to the bodily injury liability limits of the policy. *See* La. Rev. Stat. §22:1295(1)(a); *Duncan v. U.S.A.A. Ins. Co.*, 2006-363 (La. 11/29/06); 950 So. 2d 544.

Does the state have any other uninsured coverages that are mandatory or discretionary?

No.

Are such coverages governed by a statutory scheme? Are there any landmark cases?

Not applicable.

Must the insured reject such coverages in writing? What happens if the insured has not rejected coverage in writing, but later seeks such coverage?

Not applicable.

Limits

Must the UM or UIM limits match the liability limits for “bodily injury”? Are there minimum UM or UIM limits?

Yes. The UM/UIM coverage limits cannot be less than the limits of liability coverage provided by the policy unless the insured validly rejects UM/UIM coverage, selects lower limits, or selects economic-only coverage. If lower limits are selected, they must not be less than the minimum liability limits required under La. Rev. Stat. §32:900, unless economic-only coverage is selected by the insured. *See* La. Rev. Stat. §22:1295(1)(a).

Must the UMPD limits match the liability limits for “property damage”? Are there minimum UMPD limits?

See answer to “Is uninsured motorist property damage (“UMPD”) coverage mandatory or discretionary?,” *supra*.

Are there minimum limits for UEO coverage?

No.

Are there minimum limits for other uninsured coverages that are mandatory or discretionary in this state?

Not applicable.

When Is Coverage Available?

Under what circumstances is UM coverage available? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?

UM/UM coverage is available for an insured who is legally entitled to recover damages from the owner or operator of a motor vehicle for which there is no liability insurance coverage or for which the liability coverage is insufficient to cover the insured's damages. *See* La. Rev. Stat. §22:1295(1)(d).

UM/UM coverage does not apply to bodily injury, sickness, or disease, including the resulting death of an insured, while occupying a motor vehicle owned by the insured if such motor vehicle is not described in the policy under which a claim is made, or is not a newly acquired or replacement motor vehicle covered under the terms of the policy. *See* La. Rev. Stat. §22:1295(1)(e).

The determination of whether a vehicle (or, more properly, a motorist) is uninsured simply involves the issue of whether legally satisfactory proof has been presented to show that the motorist was operating a motor vehicle for which no policy of liability insurance was issued to its owner, or that he or she had no such policy issued to him or her or otherwise covering him or her for his or her operation of that motor vehicle. *Gillmer v. Parish Sterling Stuckey*, 2009-0901 (La. App. 1 Cir. 12/23/09); 30 So. 3d 782.

The monetary amount or quantum of damages sustained by the injured claimant is irrelevant to the simple issue of whether the tortfeasor motorist had no liability insurance covering him or her. *Gillmer*, 2009-0901.

Under what circumstances is UIM coverage available? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?

See answer to “**Under what circumstances is UM coverage available? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?**,” *supra*.

Under what circumstances is UMPD coverage available? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?

See answer to “Is uninsured motorist property damage (“UMPD”) coverage mandatory or discretionary?,” and “**Under what circumstances is UM coverage available? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?**,” *supra*.

Under what circumstances is UEO coverage available? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?

UEO is available under the same general circumstances as UM/UM coverage. *Dunn v. Terry*, 36,034 (La. App. 2 Cir. 6/19/02); 821 So. 2d 714, provides a discussion of how liability limits will be allocated between economic and noneconomic damages when UEO coverage is triggered by inadequate underlying liability coverage.

Under what circumstances is coverage available under other uninsured coverages? What conditions precedent must the insured satisfy? What coverage defenses can the insurer assert?

Not applicable.

Arbitrating and Litigating Disputes

Is arbitration of UM claims allowed, or specifically prohibited? UIM? UMPD? UEO? Other uninsured coverages?

Arbitration is allowed. The coverages required under La. Rev. Stat. §22:1295 may include provisions for the submission of claims to arbitration; however, the submission to arbitration shall be optional with the insured, shall not deprive the insured of his or her right to bring action against the insurer to recover any sums due him under the terms of the policy, and shall not purport to deprive Louisiana courts of jurisdiction of actions against the insurer. *See* La. Rev. Stat. §22:1295(5).

If arbitration is allowed, what procedures govern in arbitration?

No specific procedures.

If an insured claimant obtains an arbitration award in excess of the UM, UIM, UMPD, UEO or other uninsured coverage limits, can the insurer obtain a reduction of the award to match the limits?

There is no specific provision for this scenario in Louisiana.

What requirements must an insured claimant satisfy in order to file suit against, and serve, an insurer for UM coverage? UIM? UMPD? UEO? Other uninsured coverage?

No specific requirements.

Do any unique procedures govern such coverage litigation?

Not applicable.

If an insured claimant obtains a verdict in excess of the UM, UIM, UMPD, UEO or other uninsured coverage limits, can the insurer obtain a reduction of the award to match the limits?

Yes. If the insured claimant obtains a judgment or verdict for damages covered under the policy in excess of limits, the insurer can obtain a reduction of the damages to the policy limit. *Rizer v. Am. Sur. & Fid. Ins. Co.*, 95-1200 (La. 3/8/96), 669 So. 2d 387, 390; *Butler v. Allen*, 00-1726 (La. App. 1 Cir. 9/28/01), 808 So. 2d 746.

Final Amounts Paid or Awarded

Can offsets against the UM, UIM, UMPD, UEO or other uninsured coverage limits be taken?

Yes. The UM/UIM insurer has no obligation to pay any portion of the insured's damages within tortfeasor's liability policy limits; rather, the insurer is obligated to pay only damages which exceed the limits of the liability policy and are within UM/UIM limits. *Rizer v. Am. Sur. & Fid. Ins. Co.*, 95-1200 (La. 3/8/96); 669 So. 2d 387. A UM/UIM insurer is responsible for the damages suffered by an insured

which are in excess of the liability insurance of the negligent motorist, and which have not been paid by the negligent motorist or by someone responsible for the negligent motorist's fault, or by someone liable in solido with the negligent motorist.

Black's Law Dictionary defines in solido as follows:

solidary liability (sol-dair-ee) (1921) *Civil law*. The liability of any one debtor among two or more joint debtors to pay the entire debt if the creditor so chooses. La. Civ. Code art. 1794. This is equivalent to joint and several liability in the common law. - Also termed *liability in solido*.

Black's Law Dictionary (10th Ed. 2014).

The Louisiana Supreme Court has explained when a solidary obligation exists, to wit: "[A] solidary obligation exists when the obligors: (1) are obliged to the same thing, (2) so that each may be compelled for the whole, and (3) when payment by one exonerates the other from liability toward the creditor." *Cutsinger v. Redfern*, 2008-2607 (La. 5/22/09); 12 So. 3d 945, 951.

UM/UIM coverage is "excess" coverage, and a plaintiff has a right to receive from a UM insurer only that portion of his or her damages which exceed the limits of the tortfeasor's liability insurance. *McGeorge v. State Farm Mut. Auto. Ins. Co.*, 1999-2342 (La. App. 1 Cir. 11/3/00); 771 So. 2d 871. Under La. Rev. Stat. §13:4203, the UM/UIM carrier is required to pay interest on the entire judgment, including any portion in excess of the UM/UIM policy limits from date of judicial demand. *Martin v. Champion Ins. Co.*, 95-0030 (La. 6/30/95); 656 So. 2d 991.

Are offsets taken from the UM, UIM, UMPD, UEO or other uninsured coverage limit—or from total damages?

The offset is taken from the claimant's total damages. An insured has a right to receive from a UM/UIM insurer only that portion of his or her damages which exceed the limits of the tortfeasor's liability insurance. *Boudreaux v. Colonial Lloyd's Ins. Co.*, 633 So. 2d 682 (La. App. 1 Cir. 12/29/93).

Can the insurer take offsets for medical payments, workers' compensation or no-fault insurance? Are any other offsets allowed in the state?

As to a credit for medical payments, where a plaintiff's total damages do not exceed the UM/UIM policy limits and the language of the policy allows such, the UM/UIM insurer is entitled to a credit for any amount which it has paid the plaintiff under the medical payments coverage. *Boudreaux v. Colonial Lloyd's Ins. Co.*, 633 So. 2d 682 (La. App. 1 Cir. 12/29/93); *Barnes v. Allstate Ins. Co.*, 608 So. 2d 1045 (La. App. 1 Cir. 10/16/92); *White v. Patterson*, 409 So. 2d 290 (La. App. 1 Cir. 11/23/81). However, if the total damages exceed the UM/UIM limits, this offset is not allowed. See *Taylor v. State Farm Mut. Auto. Ins. Co.*, 237 So. 2d 690 (La. App. 4th Cir. 7/6/70).

UM/UIM policy provisions regarding credits for workers' compensation payments are enforceable. An insured's UM/UIM carrier and the workers' compensation insurer are solidary obligors such that payment by one extinguishes the obligation of the other to the extent of the payment. A UM/UIM insurer is entitled to a credit for medical and disability wage benefits paid on behalf of or to the plaintiff by the workers' compensation insurer based on principles of solidarity and the inapplicability of the collateral source doctrine. *Cutsinger v. Redfern*, 2008-2607 (La. 5/22/09); 12 So. 3d 945.

As far as "principles of solidarity," the Louisiana Supreme Court has said: "the collateral source rule does not apply to override the principles of solidarity expressly provided by the Civil Code." *Cutsinger*, 2008-2607, p. 10; 12 So. 3d at 952. In an older case, cited to by *Cutsinger* in explaining the "principles of solidarity," the court explained:

[T]he Civil Code expressly provides that payment by one solidary obligor exonerates the other toward the creditor to the extent of that payment, and the solidary obligor who makes the payment cannot by agreement with the creditor affect the right of the other solidary obligor to exoneration to the extent of the payment.

Fertitta v. Allstate Ins. Co., 462 So. 2d 159, 164 (La. 1985).

What liens, if any, can be asserted against the insured claimant's recovery of UM? UIM? UMPD? UEO? Other uninsured coverages?

Health Care Provider/Hospital liens, Medicaid, Medicare and Veterans Administration liens can be asserted against an insured claimant's recovery of UM/UIM coverage. See La. Rev. Stat. §§9:4751, *et seq.*, 46:446; 42 U.S.C. §2651.

Can different limits be stacked? If yes, which limits? Does a specific procedure apply?

Stacking of UM/UIM policies in Louisiana is not allowed except under one circumstance. The exception is applicable only in the instance of a person suffering injury while occupying an automobile not owned by that injured person, a resident spouse, or resident relative. *Rowe v. Williams*, 41,082 (La. App. 2 Cir. 8/23/06); 938 So. 2d 1185. The statutory exception allows the injured party to recover under the UM/UIM coverage on the vehicle in which he or she is riding (as primary coverage) and also under one other UM/UIM policy available to the injured party (as excess coverage). The pertinent statute reads as follows:

- (1)(c) ... with respect to bodily injury to an injured party while occupying an automobile not owned by said injured party, resident spouse, or resident relative, and the following priorities of recovery under uninsured motorist coverage shall apply:
 - (i) The uninsured motorist coverage on the vehicle in which the injured party was an occupant is primary.
 - (ii) Should that primary uninsured motorist coverage be exhausted due to the extent of damages, then the injured occupant may recover as excess from other uninsured motorist coverage available to him. In no instance shall more than one coverage from more than one uninsured motorist policy be available as excess over and above the primary coverage available to the injured occupant.

La. Rev. Stat. §22:1295.

In UIM claims, can the UIM insurer substitute its settlement payment for the insured's settlement with the other vehicle's/underinsured driver's liability insurer? What is the applicable procedure? What rights does the UIM insurer then have (for example, subrogation)?

No. Louisiana courts have held that the release of a tortfeasor does not effect a release of the UIM insurer. *Carona v. State Farm Ins. Co.*, 458 So. 2d 1275 (La. 11/26/84). An insurer may not enforce a clause excluding UM coverage in the event of its insured's failure to obtain the insurer's consent before entering into a reasonable settlement with an uninsured or underinsured tortfeasor and the tortfeasor's insurer. *Bond v. Commercial Union Assur. Co.*, 407 So. 2d 401 (La. 4/6/81). Compromises are favored under Louisiana law and the burden of proving the invalidity of a compromise is on the party attacking the argument. *Hymel v. Eagle, Inc.*, 2008-1287 (La. App. 4 Cir. 3/18/09), 7 So. 3d 1249.

The UM/UIM insurer has a subrogation right; however, the insurer has no greater rights in subrogation than those of its insured. If the UM/UIM insurer pays the whole obligation, it is completely subrogated to the insured's rights against the tortfeasor. If the UM insurer pays only part of the obligation, such as when it pays its policy limits which are less than the total amount of damages, it is partially subrogated to the insured's rights. If partial subrogation occurs, the insured is paid in preference to the UM insurer's right to reimbursement through subrogation, to ensure full recovery for the accident. *Egros v. Pempton*, 606 So. 2d 780 (La. 10/19/92).

Bad Faith

Does the state recognize a cause of action for bad faith in the UM context? UIM? UMPD? UEO? Other uninsured coverages?

Yes. Louisiana statutory law allows for extra-contractual claims against insurers.

La. Rev. Stat. §22:1892 (formerly La. Rev. Stat. §22:658) allows for penalties and attorney's fees for "bad faith" claim handling and applies to UM/UIM

claims. A claimant seeking extra-contractual penalties and attorney's fees under the statute has the burden of proving that the insurer failed to pay the claim within the number of days specified in the statute after receiving "satisfactory proof of loss" of the claim, and that the insurer was arbitrary or capricious in failing to pay. *Hart v. Allstate Ins. Co.*, 437 So. 2d 823 (La. 9/2/83). With regard to what constitutes "arbitrary, capricious, or without probable cause," Louisiana courts have held that the phrase is synonymous with "vexatious." A "vexatious refusal to pay" means "unjustified, without reasonable or probable cause or excuse." Both phrases describe an insurer whose willful refusal of a claim is not based on a good faith defense. *Reed v. State Farm Mut. Auto. Ins. Co.*, 2003-0107 (La. 10/21/03); 857 So. 2d 1012, 1021.

A "satisfactory proof of loss" within the meaning of La. Rev. Stat. §22:1892 (formerly La. Rev. Stat. §22:658) is that which is sufficient to fully apprise the insurer of the insured's claim. To establish a "satisfactory proof of loss" of a UM/UIM claim, the insured must establish that the insurer received sufficient facts which fully apprise the insurer that: (1) the owner or operator of the other vehicle involved in the accident was uninsured or underinsured; (2) the owner or operator of the other vehicle was at fault; (3) such fault gave rise to damages; and (4) establish the extent of those damages. *McDill v. Utica Mut. Ins. Co.*, 475 So. 2d 1085 (La. 9/10/85).

If an insurer disputes the extent of damages, but has otherwise received a satisfactory proof of loss, the insurer is obligated to unconditionally tender to the insured an amount over which reasonable minds could not differ. *McDill*, 475 So. 2d 1085.

The unreasonable failure to timely pay shall subject the insurer to a 50 percent penalty on the amount found to be due from the insurer to the insured, and an award of reasonable attorney fees. La. Rev. Stat. §22:1892(B)(1).

La. Rev. Stat. §22:1973 (formerly La. Rev. Stat. §22:1220) imposes a duty of good faith and fair dealing upon an insurer. This provision applies to UM/UIM claims. If an insurer is found to have breached its duty of good faith and fair dealing, it could be

subject to penalties and damages sustained as a result of the breach.

In addition to any general or special damages to which a claimant is entitled for breach of the imposed duty, the claimant may be awarded penalties assessed against the insurer in an amount not to exceed two times the damages sustained or \$5,000, whichever is greater. Such penalties, if awarded, shall not be used by the insurer in computing either past or prospective loss experience for the purpose of setting rates or making rate filings. La. Rev. Stat. §22:1973(C).

Louisiana courts have held that where an insurer has breached both penalty statutes, the insured cannot recover the statutory penalty under both statutes, but only under the statute more favorable to the insured. However, if the more favorable penalty is available under La. Rev. Stat. §22:1973, then the insured may also recover attorneys' fees under La. Rev. Stat. §22:1892. *See Leland v. Lafayette Ins. Co.*, 2011-475 (La. App. 3 Cir. 11/9/11); 77 So. 3d 1078; *Consolidated Cos., Inc. v. Lexington Ins. Co.*, 616 F. 3d 422 (5th Cir. 2010) (applying Louisiana law).

The penalty statutes also apply to UMPD and UEO claims. *See* La. Rev. Stat. §22:1892 (formerly La. Rev. Stat. §22:658); La. Rev. Stat. §22:1973 (formerly La. Rev. Stat. §22:1220).

Other

Are there any particular issues in UM, UIM, UMPD, UEO, or other uninsured coverages that are unique or specific to the state?

“Actions for the recovery of damages sustained in motor vehicle accidents brought pursuant to unin-

sured motorist provisions in motor vehicle insurance policies are prescribed by two years reckoning from the date of the accident in which the damage was sustained.” La. Rev. Stat. §9:5629.

“The Louisiana UM statute is liberally construed to promote fully recovery of damages by innocent automobile accident victims by making UM coverage available for their benefit as primary protection when the negligent motorist is without insurance.” *New Hampshire Ins. Co. v. Gowen*, 29,842 (La. App. 2 Cir. 9/24/97), 699 So. 2d 1169, 1171 (citation and internal quotation marks omitted).

Punitive and exemplary damages may be validly excluded from UM/UIM coverage. *Pike v. Nat'l Union Fire Ins. Co.*, 2000-1235 (La. App. 1 Cir. 6/22/01), 796 So. 2d 696. Further, where punitive and exemplary damages are excluded, the limits of the tortfeasor's underlying policy should not be exhausted by a punitive award; rather, the compensatory award should be satisfied by first exhausting the liability coverage. *See Abshire v. Desmoreaux*, 07-626 (La. App. 3 Cir. 11/7/07), 970 So. 2d 1188; *Malbreaugh v. CNA Reins. Co.*, 2003-2088 (La. App. 1 Cir. 9/17/04), 887 So. 2d 494; *Medice v. Ruiz*, 2002-0894 (La. App. 4 Cir. 2/5/03), 841 So. 2d 842.

AUTHOR

Harold J. Adkins | Hammonds, Sills, Adkins & Guice, LLP | 225.923.3462 | hadkins@hamsil.com